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Nos. 85-69 and 85-5232

In the Supreme Court of the United States

OCTOBER TERM 1985

MARION MILBURN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ROSS ALAN MILBURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a pretrial restraining order preventing the disposition of property owned by petitioners that was identified in the indictment as property purchased with the profits of a continuing criminal enterprise—and therefore subject to forfeiture—violated petitioners' Sixth Amendment rights.

2. Whether the government may rely in part upon net worth methodology to prove that property was purchased with the profits of a continuing criminal enterprise.

3. Whether the district court properly instructed the jury concerning the elements of the continuing criminal enterprise offense.

4. Whether the sentence of life imprisonment without parole imposed upon petitioner Ross Alan Milburn for operating a continuing criminal enterprise was so disproportionate to the offense as to violate the Eighth Amendment.

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In the Supreme Court of the United States

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No. 85-69

MARION MILBURN, ET AL., PETITIONERS

v.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A62)[1] is reported at 759 F.2d 1316.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1985. Petitions for rehearing were denied on May 15, 1985 (Pet. App. A63; 85-5232 Pet. App. C1). The

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[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-69.

petition for a writ of certiorari in No. 85-69 was filed on July 10, 1985. On July 5, 1985, Justice Blackmun extended the time for filing a petition for a writ of certiorari in No. 85-5232 to August 13, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner Ross Alan Milburn was convicted on one count of conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848, and one count of conspiracy to commit tax fraud, in violation of 18 U.S.C. 371. He was sentenced to life imprisonment without parole on the continuing criminal enterprise offense and a concurrent five-year term of imprisonment and a $10,000 fine on the conspiracy offense. After a separate jury trial in the same district, petitioners Ross E. Milburn, Marion Milburn, Ronald Throop, and Paula Throop were convicted of conspiracy to commit tax fraud, in violation of 18 U.S.C. 371. They were sentenced as follows: Ross E. Milburn, three years in prison; Marion Milburn, one year in prison and a $2,000 fine; Ronald Throop, one year in prison; Paula Throop, four years in prison and a $5,000 fine. The court also entered forfeiture judgments pursuant to 21 U.S.C. 848(a)(2) against certain properties purchased with the profits of the criminal enterprise.[2]

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[2]Co-defendants Michael Adkins and Terry Crafton were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846; co-defendant Gary Darnall was convicted of conspiracy to distribute cocaine (his conviction for possession of cocaine, in violation of 21 U.S.C. 841, was reversed by the court of appeals); co-defendant Paula Lewis was convicted of conspiracy to distribute cocaine, but her conviction was reversed by the court of appeals. Co-defendant Ralph Purdy pleaded guilty to conspiracy to distribute cocaine, and co-defendant Susan Elayer pleaded guilty to conspiracy to distribute cocaine and conspiracy to commit tax fraud.

1. The evidence adduced at trial, the sufficiency of which is not in dispute, established that between 1974 and 1981 petitioner Ross Alan Milburn operated a lucrative narcotics distribution enterprise centered in Cape Girardeau, Missouri. During the first years of the enterprise Milburn's couriers traveled on an almost monthly basis to Texas or Florida, obtaining approximately 300-400 pounds of marijuana on each trip. The drugs then were packaged and sold in southeastern Missouri. In 1979, Milburn switched his business from marijuana to cocaine, and his couriers began frequent trips to purchase cocaine for redistribution through Milburn's sales network. The area covered by this sales network expanded to include Arkansas, Tennessee, and Texas, as well as southeastern Missouri. During the life of the criminal enterprise Milburn directed and supervised the activities of numerous individuals: Gary Darnall, who lived in the Fort Lauderdale, Florida area and was the source for Milburn's marijuana and cocaine; Ronald Humphries, Michael Richmond, and Mark McClellan, who were his couriers; Ralph Purdy, Terry Crafton, and Michael Adkins, who were some of his dealers; and Deborah Martin and Susan Elayer, who assisted him in the operation of the drug distribution business. See Pet. App. A20-A23; C.A. No. 83-1899-EM U.S. Br. 3-12.

With the assistance of his parents, sister, and brother-in-law—petitioners Ross E. Milburn and Marion Milburn, and Paula Throop and Ronald Throop—Ross Alan Milburn concealed the proceeds of his narcotics operations from the Internal Revenue Service and invested these funds in undeveloped real estate, residences, vacation homes, and motor vehicles. The government's evidence showed that the enterprise reaped more than $200,000 in drug profits for the period April 1978 through February 1981 alone; petitioner Ross Alan Milburn's tax returns for the years 1978-1980 reported income of less than $11,000. See Pet. App. A13, A30-A31; C.A. No. 83-1899-EM U.S. Br. 13.

The government presented several different types of evidence to support the tax fraud and forfeiture counts. First, it established the amounts of Ross Alan Milburn's expenditures and demonstrated that these funds could not have come from any source other than Milburn's drug trafficking. Second, the government presented evidence linking petitioners' expenditures for the forfeited assets to the cash proceeds of the drug enterprise. For example, in November 1979 Ross E. Milburn and Marion Milburn paid for labor and materials used in the construction of their home with cash or checks funded with currency deposits. Drug profits also were used to pay for the remodeling of Ross Alan Milburn's home and for a cabin built by Paula Throop and Ronald Throop. Utilizing records kept by petitioner and his subordinates that tied these expenditures to drug receipts, the government showed that each of the 18 forfeited assets was purchased with the profits of the criminal enterprise. Pet. App. A30-A31; C.A. No. 83-1899-EM U.S. Br. 13-25. Finally, this evidence was supplemented by recorded conversations in which Ross Alan Milburn indicated that certain assets had been purchased with drug proceeds, implicated the other petitioners in the tax evasion conspiracy, and discussed the ways in which he had hidden his assets to provide defenses to a forfeiture action by the government (Pet. App. A12).[3]

2. The court of appeals unanimously affirmed petitioners' convictions (Pet. App. A1-A62). The court first addressed petitioners' claim that the Sixth Amendment guarantees the right to counsel of one's choice and that this right was violated by the district court's entry of an ex parte restraining order preventing the disposition of property included by

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[3]There also was evidence that petitioners "concoct[ed] * * * stories and feints to throw the government off the track * * * [as] part of the [tax fraud] conspiracy" (Pet App. A31).

the grand jury in the forfeiture count of the indictment.[4] The court concluded that the order did not interfere with Ross Alan Milburn's right to counsel because he did not request the services of "any * * * named attorney" and his appointed counsel "represented him ably with a thorough and aggressive defense" (Pet. App. A10). With respect to the other petitioners, the court of appeals observed that they "retained their attorney from the outset and he appears to have defended them adequately. Finding no support to the contrary, we cannot say the temporary restraining order interfered with the couples' limited right to chosen counsel" (Pet. App. A38).

The court of appeals next held that the government properly relied in part upon proof of Ross Alan Milburn's net worth to establish the forfeitability of petitioners' property under the continuing criminal enterprise (CCE) statute. The court found that "[Ross Alan Milburn] himself, in consensually recorded conversations with a government witness, refuted the possibility of a preexisting legitimate source for his remarkably high net worth" (Pet. App. A12). It held that the government had presented sufficient evidence to establish the forfeitability of the property (*id.* at A13-A19).

The court of appeals also upheld the jury instructions regarding the elements of the CCE offense. Petitioner Ross Alan Milburn contended that the instructions did not adequately convey the statutory requirement that the defendant must supervise the five or more persons with whom he

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[4]The district court subsequently ordered the magistrate to conduct an adversary proceeding concerning the restraining order at which the government showed that it was likely to convince a jury that petitioner Ross Alan Milburn violated the continuing criminal enterprise statute and that all but three of the assets subject to the order were likely to be forfeited, but the court of appeals concluded that the district court erred by failing to hold the hearing expeditiously and otherwise comply with the requirements of Rule 65 of the Federal Rules of Civil Procedure (Pet. App. A6-A8).

acts in concert. The court observed that the final sentence of the instruction concerning the supervision requirement specifically referred to " 'defendant's relationship to the five persons,' " and concluded that this reference "made clear that, for [petitioner] to be guilty, he must have supervised the group" (Pet. App. A24).

Finally, the court of appeals rejected petitioner Ross Alan Milburn's Eighth Amendment challenge to his sentence of life imprisonment without parole. Applying the three-factor test set forth by this Court in *Solem* v. *Helm*, 463 U.S. 277 (1983), the court of appeals first compared "the gravity of the offense with the harshness of the penalty," concluding that while the penalty imposed upon petitioner is "very harsh," the offense "was also great," involving "scores, if not hundreds, of felonies" (Pet. App. A25). The court observed that petitioner's sentence was longer than the sentences imposed in other CCE cases in the Eastern District of Missouri, but noted that these other terms "are [not] of an entirely different order" because they all are "harsh" and do not allow early release on parole (*id.* at A26). Finally, the court found that "the existence of life sentences in other jurisdictions puts [petitioner's] sentence in perspective and suggests that, on the basis of nationwide norms, his sentence is not unusual" (*id.* at A27).[5]

ARGUMENT

The unanimous decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

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[5]The court of appeals also rejected petitioner Ross Alan Milburn's claim that the government had not established all of the elements of the CCE offense (Pet. App. A19-A24) and concluded that the district court had ruled correctly with respect to a variety of evidentary issues raised by the other petitioners (*id.* at A28-A38).

1. Petitioners' principal contention (85-69 Pet. 7-9; 85-5232 Pet. 13-18) is that they were denied their asserted right to counsel of their choice because the temporary restraining order entered by the district court prevented the sale or transfer of petitioners' interests in certain items of property identified in the indictment as property purchased with profits of the criminal enterprise. This claim is without merit.

Upon the return of the indictment, the district court granted the government's ex parte motion for a restraining order preventing petitioners from selling or transferring interests in property enumerated in the CCE count of the indictment as subject to forfeiture.[6] The restraining order was issued for a 90-day period ending on November 22, 1982 (Pet. App. A4). The district court subsequently ordered the magistrate to conduct an adversary hearing at which the government was required to show by a preponderance of the evidence that it was likely to convince the jury that (1) Ross Alan Milburn was guilty of operating a continuing criminal enterprise, and (2) the properties at

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[6]The CCE statute provides that "[a]ny person who is convicted * * * of engaging in a continuing criminal enterprise shall forfeit to the United States" his profits from the enterprise and his interest in the enterprise (21 U.S.C. 848(a)(2)). The restraining order rested on former 21 U.S.C. 848(d), which then provided in pertinent part:

> The district courts of the United States * * * shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

The Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 2040 *et seq.*, replaced Section 848(d) with a new Section 853 pertaining to forfeiture (see § 303, 98 Stat. 2044). Subsection (f) of new 21 U.S.C. 853 (see 98 Stat. 2046) relates to district courts' authority to issue restraining orders.

issue were subject to forfeiture (85-5232 Pet. App. H1-H8, I1-I2). The magistrate found that the government had met its burden with respect to all but three of the properties; the district court adopted the report and recommendation of the magistrate and extended the restraining order until the end of the trial (Pet. App. A4; 85-5232 Pet. App. J1-J8, K1).

a. Petitioners argue that they were unable to retain counsel of their choice because the restraining order prevented them from obtaining funds through the liquidation of these assets. However, as the court of appeals held, petitioners are "in no position to raise this issue on appeal" because nothing in the record indicates that petitioners in fact were denied counsel of their choice. Pet. App. A10; see also *id.* at A38. Although the restraining order apparently barred petitioner Ross Alan Milburn from utilizing the bulk of his assets (*id.* at A8), he did not at any time indicate that he desired to retain some private attorney but was unable to do so because of a lack of assets. He did not request the services of any specific counsel, and the court of appeals found that he had been "ably" represented by appointed counsel, who provided him with "a thorough and aggressive defense" (*id.* at A10). In addition, Ross Alan Milburn did not seek modification of the order so as to exempt funds for payment of an attorney (see *United States* v. *Veon,* 538 F. Supp. 237, 247 n.16 (E.D. Cal. 1982)). Even now, he has not asserted that he would have hired some other attorney in the absence of the restraining order, nor has he expressed or indicated any basis for dissatisfaction with the attorney appointed to represent him by the district court.[7] Thus, from all that

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[7]Petitioner notes in this Court (85-5232 Pet. 14), as he did in the court of appeals (Pet. App. A10), that he "had contact with counsel in Minnesota," but he does not contend that he would have retained that counsel but for the restrictions imposed by the restraining order.

appears in the record, petitioner's appointed counsel, an experienced and able criminal attorney whose representation of petitioner was commended by the court of appeals (Pet. App. A10), was in fact petitioner's counsel of choice.

The other petitioners are in an even weaker position to raise this argument because the court of appeals did not find that the restraining order deprived them of the funds needed to hire an attorney (see Pet. App. A38). Indeed, since these petitioners selected and retained their own counsel they plainly cannot argue that they were deprived of counsel of their choice.[8]

Petitioner Ross Alan Milburn contends (85-5232 Pet. 17) that the court of appeals' finding that he was left insolvent by the restraining order establishes a violation of his asserted right to counsel of his choice in the absence of a knowing, voluntary, and unambiguous waiver of that right.[9] Although the court of appeals did find that petitioner

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[8]Petitioners in No. 85-69 claim (Pet. 7-9) that the decision below conflicts with *United States* v. *Ray*, 731 F.2d 1361 (9th Cir. 1984), but *Ray* actually supports the decision of the court below. The court in *Ray* did not decide whether the Section 848(d) restraining order at issue in that case deprived the defendant of the counsel of his choice because the defendant's chosen counsel was appointed to represent him by the district court. The *Ray* court found no violation of the right to counsel because the defendant "ha[d] not shown that the restraining order actually restricted his ability to retain counsel of his choice" (731 F.2d at 1366), the very conclusion reached by the court below in this case.

[9]Petitioner relies (85-5232 Pet. 14) upon *United States* v. *Burton*, 584 F.2d 485, 512 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979), for the proposition that the right to counsel of one's choice can be waived only by a voluntary, knowledgeable, and unambiguous waiver. The proposition appears in the dissenting opinion in that case; the majority of the court of appeals found that since lead counsel was ready to proceed with the trial, the district court did not violate the defendant's Sixth Amendment rights by denying his motion for a continuance to enable him to replace co-counsel that had been permitted to withdraw. At least the defendant in *Burton* had expressed a desire to obtain

"would have been severely hampered in his ability to pay his chosen counsel" (Pet. App. A8), it did not conclude that petitioner actually had been deprived of his chosen counsel. Petitioner relies upon the court of appeals' statement that " '[d]enial of this qualified right [to counsel of one's choice] is reversible error regardless of whether prejudice is shown' " (Pet. App. A10 (citation omitted)). However, that statement simply indicates that "a solvent defendant *who is denied chosen counsel* * * * [need not] show prejudice from this denial in order to obtain [a new trial]" (*ibid.* (emphasis added)). Although petitioner was subject to a condition that *could* have resulted in his inability to retain chosen counsel, there is absolutely no evidence that petitioner in fact was unable to retain his chosen counsel.[10]

b. Even if petitioners could raise the claim that they were deprived of counsel of their choice, reversal of their convictions would not be warranted. First, this Court never has recognized a Sixth Amendment right to counsel of one's choice. It has interpreted the Sixth Amendment to guarantee every defendant the effective assistance of counsel but has not stated that a defendant is constitutionally entitled to the assistance of the particular counsel that he prefers. See

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additional counsel, although the court felt he had been less than forceful in asserting his need for additional counsel (584 F.2d at 496 n.37). In this case, as we have discussed, the court of appeals could find no indication that petitioner preferred any counsel other than his appointed counsel. Thus, there is no question of a waiver of the right to chosen counsel here because there is no evidence that petitioner was not represented by counsel of his choice.

[10] *United States* v. *Rogers*, 602 F. Supp. 1332, 1346-1351 (D. Colo. 1985), cited by petitioner Ross Alan Milburn (85-5232 Pet. 15-16), is inapposite. That case concerned the ultimate forfeitability under the new Comprehensive Forfeiture Act of 1984 of monies already paid as attorneys' fees, and did not hold that a pretrial restraining order automatically violates the Sixth Amendment if it freezes the bulk of a defendant's assets.

Flanagan v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 8 & n.4 (reserving question).[11]

Second, the courts of appeals that have recognized a right to counsel of one's choice have acknowledged that the right is subject to reasonable restrictions. See, *e.g.*, *United States* v. *Espinosa*, No. 83-2001 (10th Cir. Aug. 26, 1985), slip op. 45-50 n.36 (need to adhere to trial schedule is legitimate reason to restrict a defendant's choice of counsel); *Ford* v. *Israel*, 701 F.2d 689, 692-693 (7th Cir.), cert. denied, 464 U.S. 832 (1983) (Sixth Amendment not violated by rule requiring that defendant be represented by local counsel). Here, any restriction of petitioners' choice of counsel resulted from the government's legitimate interest in preserving assets that the grand jury found probable cause to believe were subject to forfeiture. A defendant cannot be entitled to defeat the government's forfeiture claim by financing his legal defense with assets obtained through a criminal enterprise, any more than he would be to use the proceeds of a bank robbery seized from him for that purpose. If a defendant has no other assets, he will be entitled to counsel under the system of appointed counsel available to all indigent defendants. The fact that a defendant whose assets derive exclusively from criminal activity is represented by appointed counsel rather than paid counsel cannot constitute a deprivation of his Sixth Amendment rights.

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[11]The court below cited *Powell* v. *Alabama*, 287 U.S. 45 (1932), in concluding that such a right exists (see Pet. App. A9). But *Powell* had nothing to do with a court's rejection of a defendant's chosen counsel; the state courts had denied the defendants in that case the opportunity to obtain any counsel. Thus, when the Court stated that the defendants should have been "afforded a fair opportunity to secure counsel of [their] choice" (287 U.S. at 53), the Court was not suggesting that the defendants had the right to retain a particular lawyer. It was emphasizing that the defendants should have been permitted to obtain effective assistance of counsel by the only certain method available at that time—employment of private counsel.

c. Petitioner Ross Alan Milburn also claims error (85-5232 Pet. 17-18) in the failure of the court of appeals to fashion any remedy when it concluded that his due process rights had been violated by the district court's failure to hold an expeditious adversary hearing concerning the validity of the restraining order. As a threshold matter, we submit that the court of appeals erred in concluding that the procedures used in this case violated due process. It is settled that a grand jury's finding of probable cause to believe that a defendant has committed an offense is sufficient to justify restraints upon the defendant's liberty. See *Bell* v. *Wolfish*, 441 U.S. 520, 533-534 (1979); *Gerstein* v. *Pugh*, 420 U.S. 103, 111-116, 117 n. 19 (1975). *A fortiori,* the grand jury's determination in this case that there was probable cause to believe that petitioners' property was forfeitable must be sufficient to justify the restraining order's restriction of petitioners' property interests.

Even assuming that a due process violation occurred here, however, the crucial fact is that a hearing was held on the validity of the pre-trial restraining order, and the order was found to be justified for virtually all of the property involved. Petitioner does not challenge the correctness of this determination. In *United States* v. *Ray*, 731 F.2d 1361 (9th Cir. 1984), the district court did not conduct *any* hearing regarding the propriety of the restraining order. The court of appeals held that the defendant's due process rights were violated but properly rejected the defendant's claim that reversal of his conviction was the appropriate remedy: "The lack of a hearing did not in any material way affect [the defendant's] preparation of his legal defense and therefore violated only [the defendant's] property rights. Accordingly, it had nothing to do with the determination of his guilt or innocence. An attack on the conviction is an attack on the wrong target" (731 F.2d at 1366). Here, where the district court did conduct a hearing and upheld the

restraining order, reversal of the convictions would be completely unjustified.[12]

2. The CCE statute provides that any person convicted of engaging in a continuing criminal enterprise "shall forfeit" his profits from the enterprise and his interests in the enterprise (21 U.S.C. 848(a)(2)). Petitioner Ross Alan Milburn argues (85-5232 Pet. 18-22) that the district court erred by allowing the government to use the net worth method to prove the forfeitability of the property in this case. The court of appeals correctly rejected this contention (Pet. App. A11-A13).

The net worth method of circumstantial proof has been used for many years in tax evasion cases. It rests upon the assumption that an increase in the taxpayer's net worth that is not reflected in his tax returns and that is otherwise unexplained indicates underreporting of income. See *Holland* v. *United States*, 348 U.S. 121, 125 (1954). Petitioner argues that the net worth method does not pinpoint the source of the unreported income and therefore could not rule out possible sources of income other than his drug enterprise, and that this method of proof does not establish the required nexus between the illegal enterprise and the forfeited assets.

Whatever validity this argument may have as a theoretical matter, it is plainly inapposite here because the evidence adduced by the government on the forfeiture charge consisted of much more than proof of an increase in petitioner's net worth. First, as the court of appeals found (Pet. App.

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[12]Petitioner suggests (85-5232 Pet. 18) that the exclusion of evidence concerning the property is the appropriate remedy for the due process violation found by the court of appeals. Since the restraining order had absolutely nothing to do with either the investigation of the offense or the evidence used to establish the forfeitability of the property, petitioner's suggestion is wholly without merit.

A13), "the government's financial evidence was thorough; for the period in question, the evidence appears to foreclose all leads which might have suggested other, legitimate sources of income." Moreover, the financial evidence was supplemented by statements by petitioner himself establishing that the drug profits were the source of his increase in net worth. Petitioner stated that " '[i]f they can prove its dope money we're all gonna go down for conspiring to continue a criminal enterprise' " and acknowledged that such funds had been used to purchase some of the forfeited assets (Pet. App. A12). Finally, the government introduced other direct evidence showing that each piece of property had been purchased with drug profits, including letters written by petitioner from prison in which he gave directions for the continued operation of his business, and entries from a "drug ledger" that corresponded to currency deposits and expenditures on specific properties. Pet. App. A12-A17; see also C.A. No. 83-1899-EM U.S. Br. 13-25. Thus, petitioner's claim that the proof did not establish the source of the forfeited assets is entirely incorrect.

Petitioner also argues (85-5232 Pet. 21-22) that the government failed to use the net worth method of proof properly because it did not establish petitioner's opening net worth. In *Holland* v. *United States, supra*, this Court stated that certain procedures should be followed in tax cases involving the net worth method of proof. Observing that there were "pitfalls inherent in the net worth method" because of the circumstantial nature of the evidence (348 U.S. at 126-129), the Court concluded that when the government relies upon this method of proof, it must, among other things, establish the taxpayer's net worth at the beginning of the time period in question in order to show that the defendant's net worth actually increased over the relevant period (*id.* at 132). However, the absence of proof of petitioner's opening net worth is not at all relevant in the circumstances of this case.

First, this Court's decision in *Holland* was based upon the fact that the government was no longer restricting its use of the net worth method to cases in which the defendant had received unreported income "in a 'substantial amount,' " but was using the method in "run-of-the-mine cases, regardless of the amount of tax deficiency involved" (348 U.S. at 126). The Court's concern that the use of the net worth method in "the ordinary income-bracket cases greatly increases the chances for error" led it to impose rules such as the requirement of proof of opening net worth (*id.* at 127). Here, the amount of concealed assets plainly is not in the ordinary income range and the concerns that motivated the *Holland* Court therefore are not implicated.

Second, there was no need to prove opening net worth in this case because, as the court of appeals found, petitioner's own statements "refuted the possibility of a preexisting legitimate source for his remarkably high net worth" (Pet. App. A12). As we have discussed (see pages 13-14, *supra*), petitioner's statements and the other evidence made clear that the source of his wealth was the drug enterprise (*ibid.*).

3. Petitioner Ross Alan Milburn also contends (85-5232 Pet. 22-23) that the jury instructions relating to the CCE offense were confusing. The court of appeals properly dismissed this argument as insubstantial (Pet. App. A23-A24).

In order to establish that a person has engaged in a continuing criminal enterprise, the government must show, among other things, that drug offenses are "undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management" (21 U.S.C. 848(b)(2)). Petitioner claims that the jury instructions in this case did not make clear that the government was required to show that petitioner supervised the five or more persons with whom he was found to have

acted in concert. Jury instructions 17 and 18 (85-5232 Pet. Apps. N, O), concerned the requirement that petitioner be shown to have acted in concert with five or more persons (instruction 17) in a supervisory capacity (instruction 18). The instructions, which immediately followed each other, clearly indicate that the government was required to show that petitioner was an organizer or supervisor with respect to the group of five people. The final sentence of instruction 18 states that "[i]t is not necessary that the defendant's relationship to the five persons be of the same type at all times and it may differ with respect to certain persons with whom he acted in concert." As the court of appeals held (Pet. App. A24), this sentence, following directly on the heels of definitions of "organizer" and "supervisory position," indicated to the jury that it was required to find that petitioner supervised the group of five persons with whom he acted in concert.[13]

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[13]Ross Alan Milburn asserts (85-5232 Pet. 22-23) that this passage of the instruction "muddied the water even more." The full text of the two instructions shows that the district court properly described the elements of the offense:

> The third element of Count I is that the defendant, Ross Alan Milburn, committed these violations in concert with five or more persons. It is not required that the five or more persons who acted in concert with the defendant Ross Alan Milburn be engaged with the defendant in the commission of the continuing series of violations at the same moment or that all five were present at the same time or the same place. Further it is not required that the defendant acted in concert with five or more persons in the commission of any single offense that is one of the series of offenses constituting the continuing criminal enterprise. It is sufficient if it is proven that during the course of the commission of the continuing series of violations that the defendant acted in concert with a total of five or more persons.
>
> The fourth requirement is that you find beyond a reasonable doubt that defendant Ross Alan Milburn, occupied a position of organizer, a supervisory position or any other position of management. An organizer can be defined as a person who puts

4. Finally, petitioner Ross Alan Milburn challenges (85-5232 Pet. 23-29) his sentence of life imprisonment without parole, claiming that the sentence is so disproportionate to the CCE offense as to violate the Eighth Amendment. Petitioner does not claim that the court of appeals utilized the wrong legal standard in rejecting this claim; he argues only that the court misapplied the standard to the facts of this case. Review of this fact-bound contention is unwarranted. Moreover, the court of appeals' analysis was completely correct.

This Court stated in *Solem* v. *Helm*, 463 U.S. 277 (1983), that a reviewing court should be guided by three objective criteria in determining whether a sentence is unconstitutionally disproportionate to the offense. The court must compare the gravity of the offense and the harshness of the penalty; examine the sentence at issue in view of the sentences imposed on other defendants in the same jurisdiction; and compare the sentence at issue with sentences imposed for the same crime in other jurisdictions (463 U.S. at 290-292).

Here, the penalty received by petitioner undoubtedly was severe, but it cannot be disputed that the CCE offense is a very serious crime. As Justice Powell has observed, "[f]ew problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances." *United States* v. *Mendenhall*, 446 U.S. 544, 561 (1980). The CCE offense was designed by Congress "to reach the 'top brass' in the

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together a number of people engaged in separate activities and arranges them in these activities in one operation or enterprise. A supervisory position can be defined as meaning one who manages or directs or oversees the activities of others. It is not necessary that the defendant's relationship to the five persons be of the same type at all times and it may differ with respect to certain persons with whom he acted in concert.

drug rings." *Garrett* v. *United States*, No. 83-1842 (June 3, 1985), slip op. 8. Persons convicted of this offense are the professional drug traffickers who bear primary responsibility for the drug epidemic in our society; they certainly are deserving of harsh punishment. Moreover, illegal drug trafficking engenders untold numbers of violent crimes throughout our society, adding to a general rise in lawlessness. See *Terrebonne* v. *Blackburn*, 646 F.2d 997, 1002 (5th Cir. 1981) (en banc).[14]

The court of appeals recognized that petitioner's conduct involved "scores, if not hundreds, of felonies" over the life of the criminal enterprise (Pet. App. A25). The court also noted that petitioner's prior record included three felony convictions for possession and sale of illegal drugs. Petitioner was thus precisely the sort of offender Congress intended to reach under the CCE statute (Pet. App. A25-A26).[15]

Petitioner's sentence also is not disproportionate when compared to the sentences imposed upon other CCE offenders in the same district. While no other defendants have received life sentences, the sentences that have been imposed—terms of 25 and 40 years without possibility of parole—also are quite severe. The court of appeals correctly concluded that petitioner's sentence did not depart so

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[14]For these reasons, petitioner obviously is incorrect in his assertion (85-5232 Pet. 25-26) that his sentence was disproportionate because his offense did not involve violence but he received a more severe sentence than some persons convicted of violent crimes. Petitioner's actions were in many ways more harmful to society than an isolated act of violence.

[15]Petitioner argues (85-5232 Pet. 24-25) that his sentence was more severe than the sentences received by his co-defendants. However, petitioner was the only defendant charged and convicted of the CCE offense, and as the leader of the enterprise he plainly was more culpable than his co-defendants (see Pet. App. A26).

radically from these other sentences as to violate the Eighth Amendment (Pet. App. A25-A26).

Finally, viewed in light of CCE sentences throughout the country, it is clear that petitioner's sentence was not disproportionate. A number of sentences of life in prison without the possibility of parole have been imposed upon CCE violators. See *United States* v. *Gallo*, 763 F.2d 1504, 1508-1509 (6th Cir. 1985); *Williams* v. *United States*, 731 F.2d 138, 139-140 (2d Cir. 1984), cert. denied, No. 83-6962 (Jan. 21, 1985); *Sperling* v. *United States*, 692 F.2d 223, 224-225 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983); *United States* v. *Valenzuela*, 646 F.2d 352, 354 (9th Cir. 1980); *United States* v. *Barnes*, 604 F.2d 121, 155-158 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); *United States* v. *Bolts*, 558 F.2d 316, 319 (5th Cir. 1977), cert. denied, 439 U.S. 898 (1978); *United States* v. *Jeffers*, 532 F.2d 1101, 1105 (7th Cir. 1976), modified on other grounds, 432 U.S. 137 (1977); *United States* v. *Sisca*, 503 F.2d 1337, 1339 & n.1 (2d Cir.), cert. denied, 419 U.S. 1008 (1974). In several other cases the term of imprisonment was so long as to make it unlikely that the defendant would ever be released. See *United States* v. *Harrington*, 761 F.2d 1482, 1485 (11th Cir. 1985) (40 years); *United States* v. *Darby*, 744 F.2d 1508, 1516 (11th Cir. 1984) (60 years), cert. denied, No. 84-1261 (May 13, 1985); *United States* v. *Garrett*, 727 F.2d 1003, 1006-1007 (11th Cir. 1984) (40 years), aff'd, No. 83-1842 (June 3, 1985); *United States* v. *Phillips*, 664 F.2d 971, 985 n.2 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982) (64, 53, and 33 years); *United States* v. *Webster*, 639 F.2d 174, 180 (4th Cir.), cert. denied, 454 U.S. 857 (1981) (50 years).[16]

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[16]Petitioner argues (85-5232 Pet. 27-29) that the other cases in which a life sentence was imposed for a CCE offense all involved larger drug businesses than the scheme he conducted. However, petitioner's criminal enterprise was not trivial; it involved the distribution of substantial

The court of appeals correctly concluded that these sentences "put[] [petitioner's] sentence in perspective and suggest[] that, on the basis of nationwide norms, his sentence is not unusual." Pet. App. A27; see also *United States* v. *Harrington*, 761 F.2d at 1485-1487 (rejecting Eighth Amendment challenge to 40-year term); *United States* v. *Darby*, 744 F.2d at 1525-1529 (rejecting Eighth Amendment challenge to 60-year term); *United States* v. *Valenzuela*, 646 F.2d at 354 (rejecting Eighth Amendment challenge to life sentence); cf. *Terrebonne* v. *Blackburn, supra* (life sentence for distribution of heroin is not unconstitutional). In view of the searching analysis conducted by the court of appeals, it is clear that petitioner's life sentence, imposed for a very serious crime after several prior felony convictions for similar activity, is not so disproportionate to the offense as to offend the Constitution.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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quantities of illegal drugs. In addition, a proportionality analysis need not compare in detail every factor involved in imposing sentence in a particular case. As this Court noted in *Solem* v. *Helm*, 463 U.S. at 290 (footnote omitted), "[r]eviewing courts * * * should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals."